



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: National Endowment of the Arts—Department of Justice—
Appropriations Availability—Payment of Settlement

File: B-255772

Date: August 22, 1995

DIGEST

The National Endowment for the Arts should pay the costs of its settlement agreement using appropriations available at the time of the settlement. Appropriations available in fiscal years prior to the year of the settlement may not be used.

DECISION

This responds to the Department of Justice's (DOJ) request for a decision on behalf of its client, the National Endowment for the Arts (NEA), regarding whether the NEA can pay a settlement using unobligated appropriations from fiscal years prior to the fiscal year of the settlement agreement. As explained below, NEA must use appropriations current at the time of the settlement agreement.

On June 9, 1993, NEA entered into a settlement agreement with several plaintiffs who alleged that NEA had violated their rights with regard to applications for grants. NEA denied the allegations but settled the matter to avoid possibly costly litigation. Pursuant to the settlement, NEA agreed to pay a total of \$252,000. Of that amount, \$125,000 was in settlement of claims under the Privacy Act, including \$101,000 in attorney's fees, and was paid from the Judgment Fund. See 31 U.S.C. § 1304. The other \$127,000, also including \$101,000 in attorney's fees, was in settlement of claims under the Equal Access to Justice Act (EAJA) and was paid from NEA appropriations. See 28 U.S.C. § 2412(d)(4).

Prior to fiscal year 1993, in anticipation of eventual resolution of these claims, NEA set aside appropriations in a contingency fund. At the time of the settlement agreement, NEA asked whether it could use these prior fiscal year appropriations to pay the \$127,000 owed the plaintiffs in settlement of the EAJA claims. However, after consultation with our Office and DOJ, NEA paid the settlement using fiscal year 1993 appropriations, pending our decision on the availability of the prior fiscal year appropriations.

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As a general rule, an agency must pay a claim from the appropriation available for the fiscal year in which the amount of the claim was determined and allowed. B-216351, July 25, 1988. The date that the claim becomes a legal liability determines the fiscal year of the appropriation to be used to pay the claim. 27 Comp. Gen. 237, 238 (1947). This rule is grounded in the theory that a court or administrative award "creates a new right" in the successful claimant, giving rise to new government liability. 63 Comp. Gen. 308, 310 (1984). In this case, NEA had no obligation to pay the plaintiffs' claims until NEA officials signed the settlement agreement in June 1993.

Unless NEA had statutory authority to extend the availability of the annual appropriations reserved in the contingency fund, the monies reserved in such a fund expired at the end of their fiscal year of availability. See 58 Comp. Gen. 321 (1979). It is a fundamental principle of appropriations law that appropriated amounts are limited for obligation to a definite period and are available only for payment of expenses properly incurred during that period of availability. 31 U.S.C. § 1502. Thus, any appropriations placed in a contingency fund in fiscal years prior to 1993 would have expired before NEA entered into the settlement agreement and would not be available to liquidate any obligations except those that were incurred in the fiscal years for which the appropriations were available.

DOJ suggests that even if 1993 appropriations must be used to pay the plaintiffs' claims under the settlement agreement, prior fiscal year appropriations should be available to pay the attorney's fees. DOJ points out that prior year appropriations may be used in contract cases to pay expenses that are within the scope of the contract. 63 Comp. Gen. at 311. DOJ suggests that claims for attorney's fees are analogous to such expenses. Citing a 1982 Supreme Court decision, White v. New Hampshire, 455 U.S. 445 (1982), DOJ asserts that attorney's fees are not a primary source of liability for the government, but are collateral matters. 455 U.S. at 452. Consequently, DOJ argues, prior year appropriations should be available because the claims for attorney's fees do not create a new right, but are, instead, "based upon a perceived liability that stems from positions taken by the government in past years."

We disagree. It is because the liability for attorney's fees is collateral to NEA's primary liability that NEA must use its fiscal year 1993 appropriation. As the Court in White explained, an inquiry into attorney's fees "cannot even commence until one party has 'prevailed.'" Id. NEA became liable for attorney's fees only at that point when its primary liability to the claimants was established. As we noted above, the appropriation current for the fiscal year in which liability is established is the appropriation used to liquidate the liability. This is the same rule applied to payments under contracts. Contractual liability is established at the time the government enters into a contract. Any expense within the scope of that contract

is payable from appropriations available at the time of contracting, even if the payment is not made until a subsequent fiscal year.

Accordingly, the NEA must use its fiscal year 1993 appropriation to pay the \$127,000 awarded under the EAJA.

/s/James F. Hinchman
for Comptroller General
of the United States